

2011

Atrocity Crimes Litigation Year-in- Review (2010): A Gender Perspective

Valerie Oosterveld

Follow this and additional works at: <https://ir.lib.uwo.ca/lawpub>



Part of the [Criminal Law Commons](#), [Criminal Procedure Commons](#), [Human Rights Law Commons](#), [International Law Commons](#), [Law and Gender Commons](#), and the [Law Enforcement and Corrections Commons](#)

Citation of this paper:

Valerie Oosterveld, Atrocity Crimes Litigation Year-in- Review (2010): A Gender Perspective, 9 Nw.J. Int'l Hum. Rts. 325 (2011).
<http://scholarlycommons.law.northwestern.edu/njihr/vol9/iss3/3>

Summer 2011

Atrocity Crimes Litigation Year-in- Review (2010): A Gender Perspective

Valerie Oosterveld

Follow this and additional works at: <http://scholarlycommons.law.northwestern.edu/njihr>

Recommended Citation

Valerie Oosterveld, *Atrocity Crimes Litigation Year-in- Review (2010): A Gender Perspective*, 9 NW. J. INT'L HUM. RTS. 325 (2011).
<http://scholarlycommons.law.northwestern.edu/njihr/vol9/iss3/3>

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of International Human Rights by an authorized administrator of Northwestern University School of Law Scholarly Commons.

Atrocity Crimes Litigation Year-in-Review (2010): A Gender Perspective

Valerie Oosterveld*

I. INTRODUCTION

International criminal law continued to develop at a rapid pace in 2010. Significant judgments were issued by the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR respectively) on massacres in Srebrenica¹ and direct and public incitement to commit genocide.² The Security Council created an International Residual Mechanism for Criminal Tribunals to plan for the pending closure of these two tribunals and to carry out the legal and practical obligations (such as witness protection and sentence enforcement) that continue into the future.³ The International Criminal Court (ICC) issued a second warrant of arrest for President Al Bashir of Sudan, this time for genocide charges related to events in Darfur.⁴ At the Special Court for Sierra Leone,

* University of Western Ontario Faculty of Law (Canada). I wish to thank the Social Sciences and Humanities Research Council of Canada for its funding support and Vera Dokter for her research assistance. Any errors are the author's own.

¹ Prosecutor v. Popović et al., Case No. IT-05-88-T, Judgement (Int'l Crim. Trib. for the Former Yugoslavia Jun. 10, 2010), <http://www.icty.org/x/cases/popovic/tjug/en/100610judgement.pdf>.

² Prosecutor v. Kalimanzira, Case No. ICTR-05-88-A, Judgement (Oct. 20, 2010), <http://www.unictl.org/Portals/0/Case/English/Kalimanzira/decisions/101020-appeals.pdf>. For an excellent overview of significant developments at the ICTY and ICTR during 2010, see Katharina Margetts & Katerina I. Kappos, *Current Developments at the Ad Hoc International Criminal Tribunals*, 8 J. INT'L CRIM. JUST. 1333 (2010) and Katharina Margetts & Katerina I. Kappos, *Current Developments at the Ad Hoc International Criminal Tribunals*, 9 J. INT'L CRIM. JUST. 481 (2011).

³ S.C. Res. 1966, U.N. Doc. S/RES/1966 (Dec. 22, 2010).

⁴ Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir (July 12, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc907140.pdf>.

the year began with Charles Taylor, former President of Liberia, on the stand in his own defense.⁵ The Extraordinary Chambers in the Courts of Cambodia (ECCC) issued its first trial judgment in 2010, in the case of Kaing Guek Eav, known as Duch.⁶ And yet these developments represent only a fraction of the work undertaken in 2010 by international and internationalized criminal tribunals. This article takes a thematic focus on international criminal law events in 2010, examining them from a gender perspective. It will explore how some of these developments—as well as other, perhaps less obvious, cases—contributed either positively or negatively to the international community’s growing understanding of how international crimes, such as genocide and crimes against humanity, are intimately linked to gendered acts, such as rape.

This article examines gender-related developments in 2010 at four different international or internationalized tribunals: the ICC, ICTY, ICTR, and ECCC. Many of the developments relate to the issuance of indictments, which demonstrate increasingly sophisticated prosecutorial approaches to the recognition of the role of gender in conflict and mass violations. This article surveys indictments in the ICC’s *Mbarushimana*,⁷ *Al Bashir*⁸ and Kenya⁹

⁵ Taylor took the stand from July 13, 2009, until February 19, 2010. Alpha Sesay, *As Charles Taylor Concludes Several Months of Testimony, He Says Prosecutors Have Not Proven Any Case Against Him*, THE TRIAL OF CHARLES TAYLOR, Feb. 19, 2010, <http://www.charlestaylortrial.org/2010/02/19/as-charles-taylor-concludes-several-months-of-testimony-he-says-prosecutors-have-not-proven-any-case-against-him>. Closing arguments in his trial concluded on Mar. 11, 2011. Jennifer Easterday, *Taylor Trial Concludes; Judges Begin Deliberations*, THE TRIAL OF CHARLES TAYLOR, Mar. 11, 2011, <http://www.charlestaylortrial.org/2011/03/11/taylor-trial-concludes-judges-begin-deliberations/>.

⁶ Prosecutors v. Kaing Guek Eav *alias* Duch, Case No. 001/18-07-2007/ECCC/TC, Judgement (July 26, 2010), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/20100726_Judgement_Case_001_ENG_PUBLIC.pdf.

⁷ Prosecutor v. Mbarushimana, Case No. ICC-01/04-01/10-2-tENG, Warrant of Arrest for Callixte Mbarushimana (Sept. 28, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc954979.pdf>.

⁸ Al Bashir, ICC-02/05-01/09, Second Arrest Warrant.

⁹ On the Kenya situation, see Situation in the Republic of Kenya, Case No. ICC-01/09-19, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (Mar. 31, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf>. On the Kenya case involving gender-based crimes, see Prosecutor v. Muthaura, Kenyatta and Ali, Case No. ICC-01/09-02/11-01, Decision on the Prosecutor’s Application for a Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and

cases, the ICTR's *Nizeyimana*¹⁰ and ICTY's *Tolimir*¹¹ cases, and the ECCC's Case 002.¹² Other gender-related developments stem from the issuance of trial or appeals judgments, and therefore this article explores the ICTY's trial judgment in *Popović et al.*,¹³ the ICTR's trial judgment in *Hategekimana*¹⁴ and appeals judgment in *Rukundo*,¹⁵ and the ECCC's *Duch* judgment.¹⁶ This article also considers developments at the ICC Review Conference related to victims' issues, the implementation of which will have an impact upon the ICC's case law and processes.

The developments outlined in this article are by no means the only gender-related developments that occurred in 2010 – for example, significant evidence of gender-related crimes was proffered

Mohammed Hussein Ali (Mar. 8, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1037052.pdf>.

¹⁰ Prosecutor v. Nizeyimana, Case No. ICTR-2001-55-PT, Decision on Prosecutor's Request for Leave to File an Amended Indictment (Feb. 25, 2010), <http://www.unict.org/Portals/0/Case/English/Nizeyimana/decisions/100225.pdf>.

The indictment was subsequently amended in 2010 in response to defense motions on defects in the indictment, with the final indictment filed in response to Prosecutor v. Nizeyimana, Case No. ICTR-2000-55C-PT, Decision on Defence Preliminary Motion on Defects in the Indictment, Rules 50(C) and 72(A)(ii) of the Rules of Procedure and Evidence (Dec. 15, 2010), <http://www.unict.org/Portals/0/Case/English/Nizeyimana/decisions/101215.pdf>.

The final indictment is referred to as the Refiled Second Amended Indictment. Prosecutor v. Nizeyimana, Case No. ICTR-2000-55C-PT, Refiled Second Amended Indictment (Dec. 17, 2010), http://unict.org/Portals/0/Case%5CEnglish%5CNizeyimana%5Cindictment%5Cnizeyimana_indictment_101217e.pdf.

¹¹ Prosecutor v. Tolimir, Case No. IT-05-88/2-PT, Third Amended Indictment (Int'l Crim. Trib. for the Former Yugoslavia Nov. 4, 2009), <http://www.icty.org/x/cases/tolimir/ind/en/091104.pdf>.

¹² Prosecutors v. Nuon Chea, Ieng Sary, Khieu Samphan and Ieng Thirith, Case No. 002/19-09-2007-ECCC-OCIJ, Closing Order (Sept. 15, 2010), <http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D427Eng.pdf>.

¹³ Prosecutor v. Popović et al., Case No. IT-05-88-T, Judgement (Int'l Crim. Trib. for the Former Yugoslavia Jun. 10, 2010), <http://www.icty.org/x/cases/popovic/tjug/en/100610judgement.pdf>.

¹⁴ Prosecutor v. Hategekimana, Case No. ICTR-00-55B-T, Judgement and Sentence (Dec. 6, 2010), <http://www.unict.org/Portals/0/Case/English/Hategekimana/judgement/101206.pdf>.

¹⁵ Rukundo v. Prosecutor, Case No. ICTR-2001-70-A, Judgement (Oct. 20, 2010), <http://www.unict.org/Portals/0/Case/English/Rukundo/decisions/101020-appeals.pdf> [hereinafter Rukundo Appeals Judgement].

¹⁶ Prosecutors v. Kaing Guek Eav *alias* Duch, Case No. 001/18-07-2007/ECCC/TC, Judgement (July 26, 2010), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/20100726_Judgement_Case_001_ENG_PUBLIC.pdf.

in the ICC's prosecution of Jean-Pierre Bemba Gombo.¹⁷ However, they do point to a continuing theme within international criminal law: while there is ever-increasing awareness and knowledge of the role of gender in the commission of atrocities, there are also lingering misconceptions and a need for greater gender expertise within prosecutorial and judicial offices.

II. INTERNATIONAL CRIMINAL COURT

A. Mbarushimana Case

A significant development occurred when Callixte Mbarushimana was arrested in France on October 11, 2010, pursuant to a sealed arrest warrant issued by the ICC's Pre-Trial Chamber I on September 28, 2010.¹⁸ Mbarushimana is alleged to have been, since July 2007, the Executive Secretary of the Forces Démocratiques pour la Libération du Rwanda (FDLR) and to have also inherited some of the powers of the FDLR's President after the latter's arrest in 2009.¹⁹ The FDLR—"the most recent incarnation of Rwandan rebel groups established by former *génocidaires* who fled Rwanda after the 1994 Rwandan genocide"²⁰—is accused of a series of widespread and systematic attacks carried out in the Kivu Provinces of the Democratic Republic of the Congo (DRC) in 2009 involving

¹⁷ For example, Witness 22 testified about having been raped by three of six soldiers who entered her home and her bedroom. Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08-T-40-Red-ENG, Trial Hearing, at 19-20 (Nov. 30, 2010), <http://www2.icc-cpi.int/iccdocs/doc/doc1006058.pdf>.

¹⁸ Prosecutor v. Mbarushimana, Case No. ICC-01/04-01/10-2-tENG, Warrant of Arrest for Callixte Mbarushimana (Sept. 28, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc954979.pdf>; Press Release, International Criminal Court, New Suspect in the ICC's Custody: Callixte Mbarushimana Arrives at the ICC Detention Centre, ICC-CPI-20110125-PR620 (Jan. 25, 2011), <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc01040110/press%20releases/pr620>.

¹⁹ Mbarushimana, ICC-01/04-01/10-2-tENG, Mbarushimana Arrest Warrant, ¶ 8.

²⁰ Press Release, International Criminal Court Office of the Prosecutor, *New ICC Arrest: Leader of Movement Involved in Massive Rapes in the DRC is Apprehended in Paris*, ICC-OTP-20101011-PR582 (Oct. 11, 2010), http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc01040110/press%20releases/new%20icc%20arrest_%20leader%20of%20movement%20involved%20in%20massive%20rapes%20in%20the%20drc%20is%20apprehended%20in%20paris [hereinafter ICC OTP, *New ICC Arrest*].

many murders, rapes and acts of torture, as well as other inhumane acts, inhuman treatment, and the destruction of property.²¹ Mbarushimana is not alleged to have personally committed any of the acts attributed to the FDLR forces in the DRC, but rather is accused of contributing to the implementation of a common plan to attack the civilian populations of the DRC's North and South Kivu provinces by intentionally carrying out a campaign to "blackmail the international community and to extort concessions of political power in exchange for ending atrocities."²² Under this mode of liability, he is charged with eleven counts: the crimes against humanity of murder, torture, rape, gender-based persecution and inhumane acts, and the war crimes of attacks against the civilian population, murder, torture, rape, inhuman treatment and destruction of property.²³

This case is a very important one from a gender perspective due to the Prosecutor's intent to focus on the FDLR's sexually violent practices. Human Rights Watch has described the FDLR as having "a long and horrific record of perpetrating rapes and other forms of sexual violence against the women and girls of eastern Congo," deliberately using sexual violence as a weapon of war, including during 2009 (the time period covered by the ICC's arrest warrant against Mbarushimana).²⁴ These practices include: using rape to punish women and girls suspected of collaborating with opposing forces;²⁵ raping women and girls before killing them,²⁶ raping pregnant women, causing them to miscarry;²⁷ forcing civilian boys to rape civilian girls;²⁸ killing women and girls who resisted attempts to rape them;²⁹ and sexually mutilating women either

²¹ Mbarushimana, ICC-01/04-01/10-2-tENG, Mbarushimana Arrest Warrant, ¶ 7.

²² ICC OTP, *New ICC Arrest*, *supra* note 20, at 2; Mbarushimana is charged under article 25(3)(d) of the Rome Statute of the ICC with contributing to the commission of a crime by a group of persons acting with a common purpose. Prosecutor v. Mbarushimana, ICC-01/04-01/10-1-US, Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana, ¶¶ 40-42 (Sept. 28, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc942811.pdf>.

²³ Mbarushimana, ICC-01/04-01/10-2-tENG, Mbarushimana Arrest Warrant, ¶ 10.

²⁴ HUMAN RIGHTS WATCH, "YOU WILL BE PUNISHED": ATTACKS ON CIVILIANS IN EASTERN CONGO 72 (2009).

²⁵ Mbarushimana, ICC-01/04-01/10-1-US, Decision on the Prosecutor's Application for a Warrant of Arrest, ¶ 12(xi).

²⁶ *Id.* ¶ 12(ii).

²⁷ *Id.* ¶ 12(xiii).

²⁸ *Id.* ¶ 12(v).

²⁹ *Id.* ¶ 12(vi).

during or after rape, for example by inserting sticks into their vaginas and cutting open the wombs of pregnant females and removing their fetuses.³⁰

The ICC's Prosecutor has described this case as a "crucial step in efforts to prosecute the massive sexual crimes committed in the DRC," where over 15,000 cases of sexual violence were reported in 2009 alone.³¹ One doctor treating survivors of rape by the FDLR told Human Rights Watch: "When the FDLR rape, it's not just rape, but torture afterwards...Some burn their victims, some introduce objects into their vaginas, some shoot into their victims' vaginas...From a medical perspective, the cases of rape by the FDLR are the most severe."³²

Apart from shedding light on the rampant and intentional use of sexual violence by the FDLR in the DRC, the *Mbarushimana* case is significant because it will be the first ICC prosecution in which the crime against humanity of gender-based persecution is explored. The Rome Statute was the first statute of an international or internationalized criminal tribunal to include "gender" within the list of prohibited persecutory grounds.³³ Thus, the *Mbarushimana* case will break new ground in terms of outlining the content of gender-based persecution, and in interpreting the term "gender" as it is defined in the Rome Statute.³⁴ These issues will likely be considered as part of *Mbarushimana*'s Confirmation of Charges hearing, scheduled to begin on September 16, 2011.³⁵

³⁰ *Id.* ¶ 12(ix and x).

³¹ ICC OTP, *New ICC Arrest*, *supra* note 20, at 1. The Prosecutor is referring to statistics from the United Nations Population Fund: U.N. Secretary-General, *Report of the Secretary-General on the Implementation of Security Council Resolutions 1820(2008) and 1888(2009)*, ¶ 12, U.N. Doc. A/65/592-S/2010/604 (Nov. 24, 2010).

³² HUMAN RIGHTS WATCH, *supra* note 24, at 73.

³³ For an explanation of the inclusion of gender as a ground in the Rome Statute's crime against humanity of persecution, see Valerie Oosterveld, *Gender, Persecution, and the International Criminal Court: Refugee Law's Relevance to the Crime Against Humanity of Gender-Based Persecution*, 17 DUKE J. COMP. & INT'L L. 49, 56-59 (2006).

³⁴ For more on the definition of "gender" in the Rome Statute of the International Criminal Court, see Valerie Oosterveld, *The Definition of "Gender" in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?*, 18 HARV. HUM. RTS. J. 55 (2005).

³⁵ Prosecutor v. *Mbarushimana*, Case No. ICC-01/04-01/10, Decision Postponing the Commencement of the Confirmation Hearing, at 3 (Aug. 16, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1203623.pdf>.

B. Kenya Case

On March 31, 2010, Pre-Trial Chamber II of the ICC granted the Prosecutor's request to begin an investigation into crimes against humanity committed in Kenya during post-election violence in 2007-08. This development is significant from a gender perspective because this investigation demonstrates a rising awareness within the Office of the Prosecutor that gender-based crimes against humanity affect not only women and girls, but also men and boys. In considering the Prosecutor's request, a majority of the Pre-Trial Chamber noted reports that an increased number of rapes and other forms of sexual violence reportedly occurred during the period of December 27, 2007, through February 28, 2008³⁶ and that the available information substantiates the allegation that numerous incidents of sexual violence, including rape of women and men, took place during the post-election violence.³⁷ For example, between December 27, 2007, and February 29, 2008, the Nairobi Women's Hospital Gender Violence Recovery Centre treated 443 survivors of gender-based violence, 80 percent of whom were rape or defilement cases.³⁸ This represented a large rise in the number of reported rapes in a short time period, given that the Kenya Police Crime record noted 876 cases of rape in all of Kenya throughout 2007.³⁹ A number of United Nations and other reports noted evidence of heightened brutality involved in this gender-based violence, such as gang rapes (including rapes by over 20 men), rapes involving cutting of the victims or the insertion of crude weapons or other objects into the victim's vagina, and rapes or other violence in which family members were forced to watch.⁴⁰ The Chamber found that the Prosecutor's supporting material corroborated that, "while some of the rapes and sexual violence may be qualified as opportunistic acts facilitated by the general climate of civil unrest and lawlessness, there are however instances of sexual violence encompassing an ethnic dimension and targeting specific ethnic groups" or sexual violence committed by police or security agents.⁴¹ The Chamber

³⁶ Situation in the Republic of Kenya, ICC-01/09-19, Decision Pursuant to Article 15, ¶ 131 (Mar. 31, 2010).

³⁷ *Id.* ¶ 153.

³⁸ *Id.* ¶ 154.

³⁹ *Id.*

⁴⁰ *Id.* ¶¶ 154, 192-93.

⁴¹ *Id.* ¶ 155.

also accepted the Prosecutor's view that these victims of sexual violence have "suffered psychological trauma, social stigma, abandonment, and [been] infected with HIV/AIDS."⁴²

Another aspect of gender-based violence raised by the Prosecutor involved forced circumcisions and genital mutilation of men of certain ethnicities during the post-election violence. For example, the Chamber, in considering the widespread nature of the violence, noted a report that, "in the night from 30 to 31 December 2007 alone, 38 Luos were forcibly circumcised and left bleeding to death."⁴³ It also considered reports that forced circumcisions against Luo men were allegedly "carried out in a crude manner with objects such as broken glass,"⁴⁴ and sometimes resulted in genital amputation.⁴⁵

This investigation led to the issuance, on March 8, 2011, of Summons to Appear for six high-ranking Kenyan individuals. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang have been charged jointly with the crimes against humanity of murder, forcible transfer of population, and persecution committed against supporters or perceived supporters of the Party of National Unity.⁴⁶ Francis Kirimi Mathaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali have been jointly charged with the crimes against humanity of murder, forcible transfer, rape, persecution and other inhumane acts committed against supporters or perceived supporters of the Orange Democratic Movement.⁴⁷ The latter case incorporates the gender-based violence outlined in the Pre-Trial Chamber's authorization to investigate and therefore will be of particular interest from a gender perspective.⁴⁸

⁴² *Id.* ¶¶ 194-95. This was also supported by the victims' representatives, *see id.* ¶ 196.

⁴³ *Id.* ¶ 148.

⁴⁴ *Id.* ¶ 171

⁴⁵ *Id.* ¶ 193.

⁴⁶ Prosecutor v. Ruto, Kosgey and Sang, Case No. ICC-01/09-01/11, Decision on the Prosecutor's Application for a Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ¶ 57 (Mar. 8, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1037044.pdf>.

⁴⁷ Prosecutor v. Muthaura, Kenyatta and Ali, Case No. ICC-01/09-02/11-01, Decision on the Prosecutor's Application for a Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ¶¶ 15, 56 (Mar. 8, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1037052.pdf>.

⁴⁸ For example, in Pre-Trial Chamber II's Decision on the Prosecutor's Application for a Summons to Appear, the Chamber found reasonable grounds to

One issue that is interesting to note is the Court's categorization of forced circumcision. The Rome Statute's crimes against humanity provision does not list forced circumcision within its listing of prohibited acts. In the Prosecutor's initial application for permission to conduct an investigation into the Kenyan situation, he relied upon the category of "other inhumane acts causing serious injury" to describe forced circumcision.⁴⁹ In his application for a Summons to Appear, the Prosecutor reclassified forced circumcision as a form of sexual violence.⁵⁰ The Pre-Trial Chamber rejected this reclassification, stating that, in its view, acts of forcible circumcision are not of a sexual nature, as required by the ICC's Elements of Crimes.⁵¹ It did not elaborate on why forced circumcision is not of a sexual nature, despite the fact that there is often a sexual aspect involved in targeting male genitalia, just as there is when female genitalia is targeted in the context of crimes against humanity.⁵²

believe that from January 24-28, 2008, the Mungiki criminal organization (with which the accused are allegedly associated) carried out 39 reported cases of rape, at least five cases of forcible circumcision in Nakuru, and at least four cases of forcible circumcision of Luo men in Naivasha: *id.* ¶ 17.

⁴⁹ Situation in the Republic of Kenya, ICC-01/09-19, Decision Pursuant to Article 15, at 65. While this approach is consistent with how other prohibited acts directed against men and boys have been characterized by international criminal tribunals, see Sandesh Sivukumaran, *Sexual Violence Against Men in Armed Conflict*, 18 EUR. J. INT'L L. 253, 256 (2007) [hereinafter Sivukumaran, *Sexual Violence*] and Sandesh Sivukumaran, *Lost in Translation: UN Responses to Sexual Violence Against Men and Boys in Situations of Armed Conflict*, 92 INT'L REV. RED CROSS 259, 273 (2010) [hereinafter Sivukumaran, *Lost in Translation*]. This author would argue that forced circumcision and genital mutilation would qualify as sexual violence under the Rome Statute of the ICC.

⁵⁰ Muthaura, ICC-01/09-02/11, Decision on the Prosecutor's Application for a Summonses to Appear, ¶ 27.

⁵¹ *Id.*

⁵² The ICC's Elements of Crime define the term "sexual violence" in the following manner: "The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent." International Criminal Court Elements of Crime, ICC-ASP/1/3 at 108, U.N. Doc. PCNICC/2000/1/Add.2 (2000), art. 7(1)(g)-6, 8(2)(b)(xxii)-6, and 8(2)(e)(vi)-6. The ICTR, in *Prosecutor v. Akayesu*, defines sexual violence as "any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body

Rather, the Chamber viewed forcible circumcision as an “other inhumane act.”⁵³ The Chamber, in somewhat opaque reasoning, indicated that it reached this conclusion “in light of the serious injury to body that the forcible circumcision causes, and in view of its character, similar to other underlying acts constituting crimes against humanity.”⁵⁴

The Prosecutor’s investigation and subsequent charges highlight the fact that gender-based violence, including sexual violence, is not a female-only issue. Men and boys are also targets of such violence, but this fact has largely been marginalized in past international criminal jurisprudence.⁵⁵ One exception has been the Special Court for Sierra Leone’s case of *Prosecutor v. Sesay et al.* In that case, the Trial Chamber found that the Revolutionary United Front troops committed gender-based acts directed against men and boys as part of a reign of terror, such as: forcing male abductees to rape female abductees, slitting the sexual organs of male captives, forced undressing of male captives, carving of “RUF” on the backs of men, and forcible recruitment of boys as child soldiers.⁵⁶ That said, international criminal law is still rather undeveloped in its understanding of sexual violence, and, more broadly, gender-based violence, directed against men and boys during times of war or other widespread or systematic violations. The ICC has the opportunity to radically change this previous marginalization through the Kenya and *Mbarushimana* cases.

C. *Al Bashir* Case

Another potentially groundbreaking development arose on July 12, 2010, with the ICC Pre-Trial Chamber’s issuance of an arrest warrant containing genocide charges against the President of

and may include acts which do not involve penetration or even physical contact.” *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, ¶ 688 (Sept. 2, 1998), <http://www.unict.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf>.

⁵³ Muthaura, ICC-01/09-02/11, Decision on the Prosecutor’s Application for a Summonses to Appear, ¶ 27.

⁵⁴ *Id.*

⁵⁵ For more on this, see Sivukumaran, *Sexual Violence*, and Sivukumaran, *Lost in Translation*, *supra* note 49.

⁵⁶ *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, Judgment, ¶¶ 1210, 1067 and 1616 (Mar. 2, 2009), <http://www.scsl.org/CASES/ProsecutorvsSesayKallonandGbaoRUFCase/TrialChamberJudgment/tabid/215/Default.aspx>.

Sudan, Omar Al Bashir, relating to events in the Darfur region.⁵⁷ These are the first charges of genocide brought before the ICC, and also the first charges alleging genocide carried out through gender-based acts (in this case, rape). The Pre-Trial Chamber, in issuing its decision affirming the second Arrest Warrant against Al Bashir, reiterated its earlier holding that there were reasonable grounds to believe that Government of Sudan forces subjected, “throughout the Darfur region, . . . thousands of civilian women, belonging primarily to the Fur, Masalit and Zaghawa groups, to acts of rape.”⁵⁸ These charges complement other charges in the Darfur situation alleging rape as a crime against humanity and war crime and the crime against humanity of persecution carried out through, *inter alia*, rape.⁵⁹ They are consistent with the Prosecutor’s continuing message that “gender crimes remain unabated in Darfur.”⁶⁰ Al Bashir remains at large, despite visits in 2010 to ICC States Parties Chad and Kenya.⁶¹

⁵⁷ Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, at 9 (July 12, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc907140.pdf>.

⁵⁸ *Id.* at 6.

⁵⁹ Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, at 7 (Mar. 4, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf>; Prosecutor v. Harun, Case No. ICC-02/05-01/07, Warrant of Arrest for Ahmad Harun, at 8, 9, 13, and 14 (Apr. 27, 2007), <http://www.icc-cpi.int/iccdocs/doc/doc279813.PDF>; Prosecutor v. Abd-Al-Rahman (“Ali Kushyab”), Case No. ICC-02/05-01/07, Warrant of Arrest for Ali Kushayb, 8, 9, 14 and 15 (Apr. 27, 2007), <http://www.icc-cpi.int/iccdocs/doc/doc279858.PDF>.

⁶⁰ Eleventh Prosecutor’s Statement to the United Nations Security Council on the Situation in Darfur, the Sudan, pursuant to UNSCR 1593 (2005), ¶ 36 (June 11, 2010), http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/reports%20to%20the%20unsc/eleventh%20prosecutor_s%20statement%20to%20the%20united%20nations%20security%20council%20on%20the%20situation%20in%20darfur_%20t. See also Twelfth Prosecutor’s Statement to the United Nations Security Council on the Situation in Darfur, the Sudan, pursuant to UNSCR 1593 (2005), ¶ 6 (Dec. 9, 2010), available at <http://www.icc-cpi.int/NR/rdonlyres/3D32F788-15EF-4B56-9B26-55FD73458A7A/282820/12thspeechtotheUNSC.pdf> (“[M]ore than 2.5 million people [in Darfur] are suffering a subtle form of genocide: genocide by rape and fear.”).

⁶¹ Al Bashir travelled to Chad in July and to Kenya in August 2010. On the same day that Al Bashir traveled to Kenya, the ICC’s Pre-Trial Chamber I issued two decisions formally informing the United Nations Security Council about these visits, and noted the obligation of these States Parties to enforce the arrest warrants against Al Bashir. The Chamber also invited the Council and the ICC’s Assembly

D. Rome Statute Review Conference

The Review Conference of the Rome Statute of the International Criminal Court was held in Kampala, Uganda, from May 31 to June 11, 2010. While gender issues were a central topic of discussion during the 1998 Rome Diplomatic Conference that led to the adoption of the ICC's Statute, they were less so at the Review Conference. However, gender issues did garner particular attention during the Review Conference's stocktaking exercise under the theme of "the impact of the Rome Statute system on victims and affected communities." This stocktaking exercise was crafted so as to maintain a cross-cutting gender perspective, as well as to incorporate discussion on "breaking the silence around gender violence, deterring gender-based violence, or finding justice for victims of gender-based crimes."⁶²

of States Parties to "take any action they may deem appropriate": Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Decision Informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad, at 3-4 (Aug. 27, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc931075.pdf>; and Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Decision Informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Kenya, at 3-4 (Aug. 27, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc930979.pdf>. The President of the Assembly of States Parties issued a letter the next day to the Minister of Foreign Affairs of Kenya forwarding the decision of the Pre-Trial Chamber and, in a meeting on September 17, 2010, reiterated that "the obligation to cooperate in accordance with the Rome Statute could not be legally suspended by a [contrary] decision of the African Union. Only the Security Council could suspend the Court's investigations." Press Release, International Criminal Court, President of the Assembly Meets Minister of Foreign Affairs of Kenya, ICC-ASP-20100921-PR575 (Sept. 21, 2010), *available at* <http://www.icc-cpi.int/menus/asp/press%20releases/press%20releases%202010/president%20of%20the%20assembly%20meets%20minister%20of%20foreign%20affairs%20of%20kenya>. On May 8, 2011, Al Bashir visited ICC State Party Djibouti. The Pre-Trial Chamber informed the Security Council and the ICC's Assembly of States Parties. Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al Bashir's Recent Visit to Djibouti (May 12, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1057120.pdf>.

⁶² International Criminal Court Assembly of States Parties, Report of the Bureau on Stocktaking: The Impact of the Rome Statute System on Victims and Affected Communities, ICC-ASP/8/49, ¶¶ 2, 33, 36(c) and 40 (Mar. 18, 2010).

This cross-cutting perspective was a natural fit for several reasons. First, the Rome Statute requires gender-sensitive treatment of victims involved in ICC processes.⁶³ Second, the ICC's Prosecutor has brought charges of gender-based violence in many cases and thus victim testimony on gender-based violence is of crucial importance in these cases.⁶⁴ Finally, even in cases with no charges for gender-based crimes, seemingly gender-neutral crimes are sometimes shown to actually be gendered in practice or result.⁶⁵

The official stocktaking discussion took place on June 2, 2010, over a three-hour period. It began with a keynote address by Radhika Coomaraswamy, United Nations Special Representative of the Secretary-General on Children and Armed Conflict. This was followed by a panel discussion with Justine Masika Bihamba of Synergie des femmes pour les victimes des violences sexuelles in the Democratic Republic of the Congo, Elisabeth Rehn of the Trust

⁶³ Rome Statute of the International Criminal Court, arts. 54(1)(b), 68(1), July 17, 1998, U.N. Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90.

⁶⁴ In the Uganda situation, Joseph Kony is charged with the crimes against humanity of rape and sexual slavery and the war crime of rape and Vincent Otti (who may have died) is charged with the crime against humanity of sexual slavery and the war crime of rape. In the Democratic Republic of the Congo situation, Germain Katanga and Mathieu Ngudjolo Chui are charged with the crimes against humanity and war crimes of rape and sexual slavery. Callixte Mbarushimana is charged with the crimes against humanity and war crimes of rape, as well as persecution. In the Central African Republic situation, Jean-Pierre Bemba Gombo is accused of the crimes against humanity and war crimes of rape. In the Darfur, Sudan situation, Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb") are charged with the crimes against humanity and war crimes of rape and the crime against humanity of persecution carried out through rape, while President Omar Hassan Ahmad Al Bashir is charged with the crime against humanity of rape and genocide carried out through rape and sexual assault. In the Kenya situation, Francis Kirimi Mathaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali have been charged with the crime against humanity of rape.

⁶⁵ In the case of *Prosecutor v. Lubanga*, Lubanga was charged with the war crime of recruitment or use of child soldiers under the age of 15. *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Warrant of Arrest, at 4 (Feb. 10, 2006), <http://www.icc-cpi.int/iccdocs/doc/doc191959.PDF>. Evidence presented at his trial has illustrated that girl soldiers often had different and gender-specific experiences of child soldiering, being subjected to rape, sexual slavery, and forced pregnancy. For one example, involving girl soldiers forced to serve as "wives of the commanders," see *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06-T-277-Red-ENG, Transcript of January 14, 2010, at 61 (Jan. 14, 2010), <http://www2.icc-cpi.int/iccdocs/doc/doc864166.pdf>.

Fund for Victims, Carla Ferstman of REDRESS, David Tolbert of the International Center for Transitional Justice, Binta Mansaray of the Special Court for Sierra Leone and Silvana Arbia of the ICC.⁶⁶ Many of these speakers raised issues of special relevance to victims of gender-based violence, or commented on gendered aspects of victim participation, protection and other forms of involvement with the ICC.⁶⁷ As an outcome of this discussion, ICC States Parties adopted a resolution containing a threefold focus on gender.⁶⁸ First, the resolution stresses “the need to address the specific needs of women and children as well as to put an end to impunity for sexual violence in conflict” and refers to various United Nations Security Council resolutions on women, peace and security and on children in armed conflict.⁶⁹ Second, it urges the ICC to “improve the way in which it addresses the concerns of victims and affected communities, paying special attention to the needs of women and children.”⁷⁰ Finally, it presses national and local governments, communities, and civil organizations to play an active role in sensitizing communities about the rights of victims of sexual violence by speaking against victims’ marginalization and stigmatization, assisting them in their social reintegration and participation in consultations, and in combating a culture of impunity for sexual crimes.⁷¹ In providing direction to the ICC directly, this resolution is likely to have an impact upon how the ICC is addressing victims’ issues.

The discussion of gender and victims’ issues did not end with the official stocktaking exercise and the related resolution. In-depth consideration of topics such as the gendered dimension of victim access to the ICC, victim participation in the Court process, victim reparations, victim protection, outreach to victims and access to victims through women’s organizations as intermediaries occurred in

⁶⁶ Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May-11 June 2010, Official Records, ICC Doc. RC/11, Annex V(a), Stocktaking of International Criminal Justice, The Impact of the Rome Statute System on Victims and Affected Communities, ¶ 11 at 79.

⁶⁷ *Id.* ¶ 12 at 79.

⁶⁸ Review Conference of the Rome Statute of the International Criminal Court, Res. 2, The Impact of the Rome Statute System on Victims and Affected Communities, ICC Doc. RC/Res.2 (June 8, 2010).

⁶⁹ *Id.* preambular ¶ 3.

⁷⁰ *Id.* ¶ 2.

⁷¹ *Id.* ¶ 4.

numerous side-events at the Review Conference and in Review Conference-related publications.⁷²

The work of the ICC's Trust Fund for Victims was repeatedly referred to as a positive example of gender-sensitive interactions with victims in ICC situation countries. The Trust Fund works to mainstream a gender perspective across all of its projects and programming, and it also specifically undertakes projects and programming to benefit victims of rape, enslavement, forced pregnancy, and other forms of gender-based violence.⁷³ The Trust

⁷² For example, some side-events addressing gender issues included: International Society for Traumatic Stress Studies, "Trauma and Reparative Justice" (May 31, 2010); Women's Initiatives for Gender Justice, "Women's Court" (June 1, 2010); World Vision, "The Plight of War Victims and Affected Families in Northern Uganda: Implications for the Rome Statute System for Child Victims and Affected Families (June 1, 2010); Chile and Finland, "The Trust Fund for Victims" (June 2, 2010); No Peace Without Justice, "Sexual Orientation, Gender Identity and Article 7(3): Prosecuting Persecution on the Basis of Gender" (June 2, 2010); International Center for Transitional Justice, "Taking Stock of the Impact of the ICC in Kenya, Uganda, the Democratic Republic of the Congo, Sudan and Colombia (June 2, 2010); Victims' Rights Working Group, "Implementing Victims' Access to Justice" (June 3, 2010); DOMAC, REDRESS, Denmark and South Africa, "The Joint Role of International and National Courts in Prosecuting Serious Crimes and Providing Reparations: The African Experience" (June 4, 2010); and War Crimes Research Office, American University Washington College of Law, "Launch of *The Case-Based Reparations Scheme at the International Criminal Court*" (June 4, 2010). Publications included: Coalition for the International Criminal Court and Victims' Rights Working Group, *Civil Society Takes Stock of the Impact of the Rome Statute System on Victims and Affected Communities: Outcome Recommendations*, ¶ 2 (June 1, 2010), http://www.iccnw.org/documents/CICC-VRWG_Stocktaking_Outcome_Recommendations.pdf; Victims' Rights Working Group, *The Impact of the Rome Statute System on Victims and Affected Communities* (Apr. 2010), http://www.vrwg.org/downloads/publications/05/VRWG%20Impact%20of%20ICC%20on%20victims%2021%20April%202010%20_2_.pdf; Women's Initiative for Gender Justice, *Advancing Gender Justice: A Call to Action*, at 3, 5 and 7 (May 2010), <http://www.iccwomen.org/documents/Advancing-Gender-Justice-A-Call-to-Action-FINAL.pdf>.

⁷² Review Conference of the Rome Statute of the International Criminal Court, *The Impact of the Rome Statute System on Victims and Affected Communities*, RC/ST/V/INF.4, ¶¶ 36(a)(ii), (ix), 36(c)(iii) (May 30, 2010). *See also* International Criminal Court, *Turning the Lens: Victims and Affected Communities on the Court and the Rome Statute System*, RC/ST/V/INF.2, at 4 and 5-6 (May 30, 2010).

⁷³ International Criminal Court Trust Fund for Victims, *Recognizing Victims & Building Capacity in Transitional Societies: Spring 2010 Programme Progress Report*, at 10-11 (2010); and International Criminal Court, *Report to the Assembly of States Parties on the Activities and Projects of the Board of Directors of the*

Fund indicated that, at the time of the Review Conference, it was directly assisting, through projects in the Democratic Republic of the Congo and northern Uganda, 3,980 victims of gender-based violence (including sexual violence), 740 children of victims of gender-based violence and 400 former child soldiers who had suffered gender-based violence.⁷⁴ As well, Trust Fund projects sensitized 12,375 community peacebuilders and 300 children to gender-based violence and victims' rights.⁷⁵ The work of the Trust Fund represents an interesting, and atypical, part of the ICC's overall efforts to address gender-based violations of international criminal law.

III. INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

The main gender-related developments at the International Criminal Tribunal for the Former Yugoslavia stemmed from cases related to the massacres in Srebrenica. They are different from the developments at the other tribunals, which tend to focus on sexual violence. The ICTY developments highlight the intensely gendered nature of seemingly gender-neutral acts of genocide and crimes against humanity. In the much-anticipated June 10, 2010, judgment in *Prosecutor v. Popović et al.*, Trial Chamber II held that genocide was committed by members of the Bosnian Serb forces, including the accused Popović, against the Muslims of Eastern Bosnia.⁷⁶ This genocide was committed by targeting men, boys, women and girls in different, and therefore gendered, ways. Able-bodied Bosnian Muslim men and boys were separated from women, girls, and males younger than 15 and older than 65 years of age.⁷⁷ This resulted in serious bodily and mental harm to the separated males, who endured "a painful separation process and the anxiety that followed from not

Trust Fund for Victims for the Period 1 July 2009 to 30 June 2010, ICC-ASP/9/2, ¶ 6 (July 28, 2010) [hereinafter July 2010 Trust Fund for Victims Report].

⁷⁴ July 2010 Trust Fund for Victims Report, *supra* note 73, Table 2.

⁷⁵ *Id.* At the Review Conference, Australia, Austria, Finland, Germany, Ireland, Liechtenstein, Netherlands, Poland, Spain, Switzerland, Tanzania, and the United Kingdom (the last specifically referencing supporting victims of sexual violence), pledged to contribute funds to the Trust Fund for Victims: Review Conference of the Rome Statute of the International Criminal Court, Pledges, RC/9, at 2, 6, 7, 8, 10, 13-16 (July 15, 2010).

⁷⁶ *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Judgement, ¶ 863 (Int'l Crim. Trib. for the Former Yugoslavia Jun. 10, 2010), <http://www.icty.org/x/cases/popovic/tjug/en/100610judgement.pdf>.

⁷⁷ *Id.* ¶¶ 779, 841, 856-62.

knowing what would happen to their families.”⁷⁸ Once detained, they had their personal property and identification removed, and they suffered fear and terror about their uncertain fate.⁷⁹ They were detained in intolerable conditions with no food and little water, and hope of survival was extinguished when they were brought to the execution sites.⁸⁰ They were then killed.⁸¹ The Trial Chamber noted that these men were killed in operations that revealed “a great deal of synchronization” carried out in a “concerted and coordinated” manner.⁸² The women, girls and others who were the surviving family members also suffered serious mental harm, as they had to endure the separation process from their brothers, fathers, husbands and sons, were torn from their homes through forcible transfer, and were left with uncertainty about the fate of their loved ones and about their own future.⁸³ The Trial Chamber found that the murder of the men had a profound and long-lasting impact on their female family members: “[m]any survivors suffer from guilt and engage in self-destructive behaviour; some would prefer to have died with the males.”⁸⁴

A related case, *Prosecutor v. Tolimir*, opened at the ICTY on February 26, 2010.⁸⁵ Tolimir is similarly charged with responsibility for genocide and crimes against humanity for the gender-based separation and subsequent murder of the able-bodied males and the forcible transfer of women and children from Srebrenica and the area.⁸⁶ The indictment alleges that the murders and forcible transfers created conditions that led to the destruction of the entire Muslim population of Eastern Bosnia, “including but not limited to the failure of the population to live and reproduce normally.”⁸⁷ Both the *Popović et al.* and the *Tolimir* cases reiterate that seemingly gender-

⁷⁸ *Id.* ¶ 844.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* ¶ 779.

⁸² *Id.* ¶¶ 860, 862, 883-86.

⁸³ *Id.* ¶ 846.

⁸⁴ *Id.* ¶ 847.

⁸⁵ *Prosecutor v. Tolimir*, Case No. IT-05-88/2-PT, Third Amended Indictment (Int’l Crim. Trib. for the Former Yugoslavia Nov. 4, 2009), <http://www.icty.org/x/cases/tolimir/ind/en/091104.pdf>.

⁸⁶ *Id.* ¶¶ 10, 21, 24, 27, 34.

⁸⁷ *Id.* ¶ 24.

neutral acts, such as the massacres in Srebrenica, can be carried out in profoundly gendered ways and have gendered effects.

IV. INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

A. *Nizeyimana* Case

The International Criminal Tribunal for Rwanda was involved in positive, mixed, and negative developments of note in 2010 with respect to gender-related acts. In the positive development, the indictment in *Prosecutor v. Nizeyimana* was amended to include additional charges of gender-based violence.⁸⁸ Nizeyimana was a Captain in the Rwandan Armed Forces and second-in-command at the École des Sous Officiers (ESO) in Butare prefecture in April and May 1994.⁸⁹ He is alleged to have exercised power, authority, and influence over soldiers, *Interahamwe*, and others in the region who perpetrated the 1994 genocide.⁹⁰ The first indictment, from November 2000, charged Nizeyimana with four counts of genocide and crimes against humanity, including one count of rape as a crime against humanity.⁹¹ Nizeyimana was arrested in October 2009 and transferred to the ICTR.⁹² In February 2010, Trial Chamber III issued a decision permitting the prosecution to add additional allegations of rape—including rape within genocide and as a war crime—and killings and new modes of liability (joint criminal enterprise and superior responsibility).⁹³

⁸⁸ *Prosecutor v. Nizeyimana*, Case No. ICTR-2001-55-PT, Decision on Prosecutor's Request for Leave to File an Amended Indictment, ¶ 1 (Feb. 25, 2010),

<http://www.unicttr.org/Portals/0/Case/English/Nizeyimana/decisions/100225.pdf>.

This amended indictment was subsequently amended, with the final version titled "Refiled Second Amended Indictment." *Nizeyimana*, ICTR-2001-55C-PT, Refiled Second Amended Indictment.

⁸⁹ *Nizeyimana*, ICTR-2001-55C-PT, Refiled Second Amended Indictment, ¶ 2(a) and (b).

⁹⁰ *Id.* ¶ 2(c).

⁹¹ *Nizeyimana*, ICTR-2001-55-PT, Decision on Amended Indictment, ¶ 1.

⁹² Press Release, ICTR, Idelphonse Nizeyimana Arrested and Transferred Today to Arusha (Oct. 6, 2009) ICTR/INFO-9-2-616.EN, available at <http://www.unicttr.org/tabid/155/Default.aspx?id=1003>.

⁹³ *Nizeyimana*, ICTR-2001-55-PT, Decision on Amended Indictment, at 10-11.

The final indictment⁹⁴ outlines extensive allegations related to gender-based violence. Under the charge of genocide by killing or causing serious bodily or mental harm to Tutsis, Nizeyimana is accused of having twice ordered soldiers at the beginning of the genocide to rape Tutsi women and then kill them.⁹⁵ He is also accused of authorizing, ordering or instigating the rape and killing of female Tutsi civilians at Butare Hospital, including women in the maternity ward who had recently given birth.⁹⁶ He is also alleged to have ordered and instigated soldiers, *Interahamwe* and others to target female Tutsi students at Butare University for sexual violence and killing, and he is personally accused of shooting and killing four female Tutsi civilians at the university.⁹⁷ He is accused of ordering or instigating more than one dozen soldiers and others to be present at the rape of a female civilian aged 18-20 in the residence of Rosalie Gicanda,⁹⁸ and of responsibility for other rapes committed in civilian houses by soldiers under his command.⁹⁹ The indictment further alleges that, between April 6-9, approximately 14 soldiers acting under Nizeyimana's authority raped three women multiple times over the course of three days in a house near the ESO camp.¹⁰⁰ One of these women was then taken by a soldier to another house and raped for approximately two weeks.¹⁰¹ These allegations are also relied upon by the prosecution for charges of rape as a crime against humanity and as a war crime.¹⁰² The amendment of the *Nizeyimana* indictment indicates a detailed understanding of the central role that rape played in the express targeting of Tutsi women and girls during the genocide.

⁹⁴ Nizeyimana, ICTR-2000-55C-PT, Decision on Defence Motion; Nizeyimana, ICTR-2001-55C-PT, Refiled Second Amended Indictment.

⁹⁵ Nizeyimana, ICTR-2001-55C-PT, Refiled Second Amended Indictment, ¶ 31.

⁹⁶ *Id.* ¶¶ 31(iii), (iv), 35. As well, Nizeyimana is accused of responsibility for the killing of a Hutu nurse at the hospital who was married to a Tutsi and was seven months pregnant. *Id.* ¶ 15(iv).

⁹⁷ *Id.* ¶¶ 14(ii), (iii), 31.

⁹⁸ *Id.* ¶ 31(i).

⁹⁹ *Id.* ¶¶ 33-34.

¹⁰⁰ *Id.* ¶ 32.

¹⁰¹ *Id.* ¶ 31(iv).

¹⁰² *Id.* ¶¶ 47-50, 55-58.

B. Hategekimana Case

In December 2010, Trial Chamber II issued its judgment in the case of *Prosecutor v. Hategekimana*.¹⁰³ Hategekimana was the Commander of the Ngoma Military Camp in Butare prefecture, a lieutenant in the Rwandan Armed Forces and a member of the Butare prefecture Security Council during the events of 1994.¹⁰⁴ He was charged with four counts of genocide, complicity in genocide, murder as a crime against humanity and rape as a crime against humanity.¹⁰⁵ He was originally jointly charged with Nizeyimana and one other individual, but his indictment was subsequently severed so he could be tried individually.¹⁰⁶ The results of the trial present a mixed picture of success and failure on the part of the prosecution in proving crimes of sexual violence. The prosecution alleged that Hategekimana attended a meeting of Butare prefecture military officials at the start of the genocide, on April 7, 1994, at which he ordered Ngoma Camp soldiers under his command to kill Tutsis and to rape Tutsi women before killing them.¹⁰⁷ The Trial Chamber found that the evidence presented did not support this allegation, and therefore dismissed it.¹⁰⁸ In addition, the prosecution alleged that Hategekimana abducted Tutsi women and kept them against their will in his home, where he raped them.¹⁰⁹ The Chamber dismissed this allegation for lack of proof beyond a reasonable doubt.¹¹⁰ The Chamber found that the evidence presented needed to be “treated with caution,” as the prosecution witness did not see any victim raped, and was based on accounts received from members of Hategekimana’s escort as well as inferences from his own observations.¹¹¹

Similarly, the Chamber dismissed allegations that individuals under the military command or effective control of Hategekimana raped Tutsi women in and around Butare Town, as the Chamber found that the evidence presented did not establish that the rapes

¹⁰³ Hategekimana, ICTR-00-55B-T, Judgment and Sentence.

¹⁰⁴ *Id.* ¶ 3.

¹⁰⁵ *Id.* ¶ 5.

¹⁰⁶ *Id.* ¶ 4.

¹⁰⁷ *Id.* ¶¶ 10, 123.

¹⁰⁸ *Id.* ¶¶ 11, 137.

¹⁰⁹ *Id.* ¶¶ 12, 138.

¹¹⁰ *Id.* ¶¶ 13, 172, 177-78.

¹¹¹ *Id.* ¶ 167.

were committed by soldiers under his command.¹¹² The Chamber did note, however, that “[t]here is no dispute that rapes were committed in Butare as part of a series of attacks perpetrated against Tutsis and moderate Hutus during the 1994 events in Rwanda. Indeed, the Chamber has heard evidence from both the Prosecution and the Defence that such rapes were notorious.”¹¹³ Hategekimana was convicted of superior responsibility for the crime against humanity of rape of Nura Sezirahiga on or about April 23, 1994.¹¹⁴ The Chamber found that eyewitness evidence from Nura Sezirahiga’s father as to her rape and murder, four metres away from him by a soldier who had been dropped off by Hategekimana, was reliable.¹¹⁵ “In the Chamber’s view, even if Hategekimana was not present during the rape, he had reason to know that one or more of the soldiers were about to commit such an offence or had done so” and that he “took no necessary nor reasonable measures to prevent the rape or punish the perpetrator.”¹¹⁶ Since Nura Sezirahiga was Hutu, the Trial Chamber found that she was raped due to the perceived political affiliation of her father.¹¹⁷

The addition of details in the *Nizeyimana* indictment relating to the role of rape within the Rwandan genocide, and the conviction of Hategekimana for the crime against humanity of rape, are positive developments considering the ICTR’s past record of under-prosecution, or poor prosecution, of sexual violence crimes.¹¹⁸ However, the number of rape-related allegations dismissed in the *Hategekimana* trial judgment indicates that the prosecution continues to, as it has in the past, face significant difficulties in providing adequate evidence to support its allegations of sexual violence. As of April 2004, Nowrojee noted that, in those 30 percent of ICTR cases where rape charges are brought, there is only a 10 percent conviction

¹¹² *Id.* ¶¶ 12-13, 175, 177-78.

¹¹³ *Id.* ¶ 165.

¹¹⁴ *Id.* ¶ 464.

¹¹⁵ *Id.* ¶¶ 456, 458, 460, 463, 464, 726-27.

¹¹⁶ *Id.* ¶ 727.

¹¹⁷ *Id.* ¶ 725.

¹¹⁸ See, e.g., Beth Van Schaack, *Obstacles on the Road to Gender Justice: The International Criminal Tribunal for Rwanda as Object Lesson*, 17 AM. U. J. GENDER, SOC. POL’Y & L. 364-65 (2009); Binaifer Nowrojee, “Your Justice is Too Slow”: Will the ICTR Fail Rwanda’s Rape Victims?, 10 U.N. RES. INST. SOC. DEV. OCCASIONAL PAPER 8 (2005), available at [http://www.unrisd.org/80256B3C005BCCF9/\(httpAuxPages\)/56FE32D5C0F6DCE9C125710F0045D89F/\\$file/OP10%20Web.pdf](http://www.unrisd.org/80256B3C005BCCF9/(httpAuxPages)/56FE32D5C0F6DCE9C125710F0045D89F/$file/OP10%20Web.pdf).

rate.¹¹⁹ She explains that the 20 percent acquittal rate resulted from the court's finding "that the prosecutor did not properly present the evidence [of rape] beyond a reasonable doubt."¹²⁰ Nowrojee indicates that the prosecution's failures are symptomatic of failures from the very beginning of the investigation process: "[o]ver the past decade, sexual violence crimes at the ICTR have never been fully and consistently incorporated into the investigative and prosecution strategy of the Prosecutor's Office," and therefore "no comprehensive prosecution strategy or precise work plan to properly document and bring the evidence of sex crimes into the courtroom has been consistently pursued."¹²¹ This strategic omission led to poor investigations by individuals not properly equipped to collect evidence of sexual violence, which then resulted in a lack of sexual violence charges or, when charges were laid, often as an afterthought, gaps in evidence at trial and a lack of appeals of acquittals.¹²² Nowrojee highlights two other important weaknesses that make witnesses reluctant to offer evidence of rape: a judicial failure to create a welcoming courtroom atmosphere for victims and witnesses of sexual violence, and an institutional failure to ensure sustained follow-up for post-trial victim and witness protection.¹²³ Van Schaack remarks that these problems continue in the investigation, charging, plea bargaining, and victim and witness protection stages of ICTR proceedings.¹²⁴ Thus, "the results of the cases before the ICTR [still] do not reflect the high level of gender violence in Rwanda during the genocide."¹²⁵ Sellers refers to the ICTR's mishandling of sexual assault charges as "gender injustice."¹²⁶ These difficulties have been recognized by the ICTR itself.¹²⁷ While the *Hategekimana* judgment's dismissal of a number

¹¹⁹ Nowrojee, *supra* note 118, at 3.

¹²⁰ *Id.*

¹²¹ *Id.* at 8.

¹²² *Id.* at 12-13, 18.

¹²³ *Id.* at 25.

¹²⁴ Van Schaack, *supra* note 118, at 365-66.

¹²⁵ *Id.* at 365.

¹²⁶ Patricia V. Sellers, *Gender Strategy is Not a Luxury for International Courts*, 17 AM. U. J. GENDER, SOC. POL'Y & L. 301, 316-317 (2009).

¹²⁷ INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, BEST PRACTICES MANUAL FOR THE INVESTIGATION AND PROSECUTION OF SEXUAL VIOLENCE CRIMES IN SITUATIONS OF ARMED CONFLICT: LESSONS FROM THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (2008), available at <http://lexglobal.org/files>

of rape allegations due to lack of evidence beyond a reasonable doubt has confirmed that Nowrojee's, Sellers' and Van Schaack's concerns continue to be warranted, it is hoped that the *Nizeyimana* case will prove to be the exception to this past unfortunate ICTR history.

C. *Rukundo* Case

The negative development occurred in the appeals judgment in *Prosecutor v. Rukundo*, released on October 20, 2010.¹²⁸ The Trial Chamber had originally convicted Rukundo, an ordained priest and military chaplain for the Rwandan Armed Forces, of committing genocide by causing serious mental harm to a young Tutsi woman when he sexually assaulted her in May 1994 at the Saint Léon Minor Seminary in Gitarama Prefecture.¹²⁹ The woman testified that, on Rukundo's arrival at the seminar, she asked if he could hide her.¹³⁰ She feared for her life.¹³¹ He responded that he could not help her, as her entire family had to be killed because her relative was an *Inyenzi*.¹³² She assisted him in carrying some items to his room, in the hope that he would change his mind and hide her, but once at the room, he locked the door, placed his pistol on the table, forced the young woman into the bed, opened the zipper to his trousers, and tried to spread her legs and have sexual intercourse.¹³³ She resisted, and he instead rubbed himself against her until he ejaculated.¹³⁴ She felt that she could not escape because he was physically on top of her, and also because he was "in a position of authority and had a gun."¹³⁵ The Trial Chamber found this witness to be credible and accepted her evidence.¹³⁶ The Trial Chamber also found that the act was of a sexual nature, taking place under coercive circumstances in

/Renifa%20Madenga-ICTR%20Practice%20Manual.pdf – see, in particular, ¶¶ 8, 13 and 23.

¹²⁸ Rukundo Appeals Judgement, *supra* note 15.

¹²⁹ *Id.* ¶ 227; Prosecutor v. Rukundo, Case No. ICTR-2001-70-T, Judgement, ¶¶ 4, 574-76 (Feb. 27, 2009), <http://www.unictr.org/Portals/0/Case/English/Rukundo/090227.pdf> [hereinafter Rukundo Trial Judgement].

¹³⁰ Rukundo Trial Judgement, *supra* note 129, ¶ 373.

¹³¹ *Id.* ¶ 384.

¹³² *Id.* ¶ 373.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* ¶¶ 377-78.

which the Tutsi refugees at the seminary were regularly abducted and killed.¹³⁷ A majority of the Trial Chamber concluded that the young woman had suffered serious mental harm.¹³⁸ In making this conclusion, the majority considered the “highly charged, oppressive and other circumstances surrounding the sexual assault.”¹³⁹ Given the totality of the circumstances, from the general context of mass violence against Tutsis in the area and the specifics of Rukundo’s words prior to assaulting the young woman (that her entire family had to be killed), a majority of the Trial Chamber convicted Rukundo of committing genocide through the sexual assault.¹⁴⁰

A majority of the Appeals Chamber reversed this conviction. It recalled that inferences drawn from circumstantial evidence must be the only reasonable inference available, and that “genocidal intent is not the only reasonable inference to be drawn from Rukundo’s assertion that the young woman’s family had to be killed because one of her relatives was assisting the *Inyenzi*.”¹⁴¹ Rather, the majority found that “Rukundo’s language can plausibly be interpreted as expressing anger that a former friend was affiliated with the ‘*Inyenzi*,’ without signifying a personal desire to destroy Tutsis.”¹⁴² Rather surprisingly, given the fact that the young woman and her family were Tutsis seeking refuge from death in the seminary, the majority rejected the “general context of mass violence” against Tutsis as contributing to a finding of genocidal intent with respect to this incident.¹⁴³ The Appeals Chamber majority held that the act committed against the young woman was “qualitatively different from the other acts of genocide perpetrated by Rukundo,” such as the search for Tutsis on the basis of identity cards and lists and their

¹³⁷ *Id.* ¶¶ 381 and 383-85.

¹³⁸ *Id.* ¶ 389.

¹³⁹ *Id.* ¶ 388. These circumstances included the following: Tutsis were victims of mass killings; the young woman and her family feared death and sought refuge in a religious institution; upon seeing the accused—a familiar and trusted person of authority and of the church—the young woman requested protection for herself; the accused refused her this protection and specifically threatened her; Rukundo had a pistol; the young woman tried to ingratiate herself to Rukundo by assisting him to carry his effects to the room; the accused locked the door of the room, put his pistol down and physically assaulted her in a sexual way; and the young woman was sexually inexperienced at the time of the assault. *Id.*

¹⁴⁰ *Id.* ¶ 576.

¹⁴¹ Rukundo Appeals Judgement, *supra* note 15, ¶ 235.

¹⁴² *Id.* ¶ 235.

¹⁴³ *Id.* ¶ 236.

subsequent killing or assault.¹⁴⁴ In contrast, the Appeals Chamber majority considered the sexual assault of the young woman by Rukundo to be “unplanned and spontaneous,” and therefore “an opportunistic crime that was not accompanied by the specific intent to commit genocide.”¹⁴⁵ They therefore reduced the 25-year sentence originally imposed on Rukundo by the Trial Chamber to 23 years.¹⁴⁶

Judge Pocar issued a strong and convincing partially dissenting opinion, in which he does not agree with this reversal of the Trial Chamber’s original conviction. In his view, the majority’s “alternative explanation for Rukundo’s utterances before the sexual assault is not reasonable,” and “the proper focus should have been on what Rukundo’s words conveyed about his intention.”¹⁴⁷ In Judge Pocar’s view, these words “clearly conveyed Rukundo’s knowledge that his victim was Tutsi and that she and other members of her family should be killed for this reason alone.”¹⁴⁸ He felt that this was “compelling evidence” of Rukundo’s genocidal intent at the time of the assault, “in particular coupled with the serious nature of his crime and the campaign of massive violence directed against Tutsis in the area in which he was found to have participated.”¹⁴⁹ In other words, unlike the majority conclusion, Judge Pocar recognized that the context in which the sexual assault occurred was both relevant and important. Judge Pocar also found the majority’s differentiation of Rukundo’s sexual assault from his other acts of genocide unreasonable.¹⁵⁰ In his view, the majority “does not fully appreciate the seriousness of the crime,” which is not qualitatively different from other killings or serious bodily injury for which he has been held responsible.¹⁵¹ Again, Judge Pocar pointed out that the surrounding context was instrumental in understanding the seriousness of the crime: the young woman was a Tutsi refugee “fleeing violence in the surrounding area in which Tutsis were being hunted down. She was dirty and hungry and her place of refuge was not safe;” she knew and trusted Rukundo; Rukundo was armed; and

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* ¶ 269. The reduction was also related to a change in Rukundo’s form of responsibility for his crimes. *Id.*

¹⁴⁷ *Id.* ¶ 3 (Pocar, J., partially dissenting).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* ¶ 3.

¹⁵⁰ *Id.* ¶ 4.

¹⁵¹ *Id.*

Rukundo used force against her to hold her down and to commit a sexual act.¹⁵² Judge Pocar referred to appeals jurisprudence confirming that “[s]exual violence necessarily gives rise to severe pain and suffering,” and indicated that, while no penetration occurred, “this crime is of comparable gravity to rape, at least in terms of mental harm.”¹⁵³ In addressing the majority’s reference to the sexual assault as merely “opportunistic,” Judge Pocar also made a crucial distinction between motive and intent, which seemingly was missed by the majority appeals judges; even if the perpetrator’s motivation is entirely sexual, it does not follow that the perpetrator does not have the requisite intent (in this case, genocidal intent) or that his conduct does not cause severe pain and suffering.¹⁵⁴ He also pointed out that the prohibited act does not need to fit into a pattern of identical conduct, nor does the prohibited act itself need to be widespread or systematic.¹⁵⁵

The reasoning of the majority of the Appeals Chamber—particularly the separation of Rukundo’s words to the victim from the overall context in which the sexual assault took place, and the classification of the sexual assault as opportunistic—serves to highlight a significant, but unfortunately persistent, misunderstanding about the role of sexual and gender-based violence during genocide, mass violations or armed conflict. That is, there is an unwillingness, particularly within the ICTR, to “draw meaningful inferences from circumstantial evidence” in cases of sexual violence, which includes “the broader context which makes clear the sexual violence is an integral part of the organized war effort [or genocide] rather than mere ‘incidental’ or ‘opportunistic’ incidents.”¹⁵⁶ The reasoning of the Appeals Chamber majority in *Rukundo* seems to fit neatly within van Schaack’s description of the “tendency to view acts of gender violence committed during armed conflicts or repression as simply opportunistic or as private crimes reflecting

¹⁵² *Id.* ¶¶ 5-8.

¹⁵³ *Id.* ¶ 9, referring to Prosecutor v. Kunarac et al., Case No. IT-96-23 & IT-96-23/1-A, Appeals Chamber Judgment, ¶ 150 (June 12, 2002), <http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf>.

¹⁵⁴ *Id.* ¶ 10.

¹⁵⁵ *Id.* ¶ 11.

¹⁵⁶ Susana SáCouto and Katherine Cleary, *The Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court*, 17 AM. U. J. GENDER, SOC. POL’Y & L. 337, 358 (2009). The authors highlight the ICTR’s failings at 354-58.

personal motives and desires that are unconnected to, or simply capitalizing upon, the prevailing state of war—an attitude that mirrors the public/private divide that runs through much of law and society.”¹⁵⁷ Citing the ICTR’s leading case on the link between sexual violence and genocide, Van Schaack notes that this attitude runs counter to the fact that “gender violence is regularly employed alongside and to exacerbate other forms of violence and repression.”¹⁵⁸ It is hoped that the worrisome and regressive reasoning of the majority in the Appeals Chamber in *Rukundo* will not be repeated in any of the remaining ICTR trial and appeals judgments.

V. EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

A. *Duch* Case (Case 001)

The final developments of note in 2010 that this article will highlight occurred in the Extraordinary Chambers in the Court of Cambodia. The first is related to the July 26, 2010, Trial Chamber judgment in the case of Kaing Guek Eav, known as *Duch* (also referred to as Case 001).¹⁵⁹ *Duch* was the Chairman of S-21, a very important Khmer Rouge interrogation facility that received victims from every part of Cambodia and operated from October 1975 to January 1979, a significant portion of the regime.¹⁶⁰ *Duch* was charged with planning, instigating, ordering, committing, or aiding and abetting crimes against humanity, grave breaches of the Geneva Conventions of 1949, and national crimes of premeditated murder and torture.¹⁶¹ The trial and judgment did not focus on gender-based violence, but did address an allegation of rape committed against a female detainee at S-21. The accused acknowledged that an S-21 staff member inserted a stick into the vagina of a female detainee during an interrogation.¹⁶² This incident was characterized by the Trial Chamber as the crime against humanity of torture, rather than as the crime against humanity of rape, because it was “an egregious component of the prolonged and brutal torture inflicted upon the

¹⁵⁷ Van Schaack, *supra* note 118, at 376.

¹⁵⁸ *Id.* at 377 (citing Akayesu, ICTR-96-4-T, Judgement, ¶ 734).

¹⁵⁹ Kaing Guek Eav, 001/18-07-2007/ECCC/TC, Judgement.

¹⁶⁰ *Id.* ¶¶ 23, 25.

¹⁶¹ *Id.* ¶ 11.

¹⁶² *Id.* ¶ 246.

victim prior to her execution.”¹⁶³ This is despite the fact that the Chamber recognized that the facts met the legal elements of both rape and torture.¹⁶⁴ The Trial Chamber subsequently concluded that the findings of torture were subsumed within the crime against humanity of persecution on political grounds.¹⁶⁵ Thus, the evidence of rape was first collapsed into the crime against humanity of torture, and then torture was collapsed into the crime against humanity of persecution, despite the acknowledgement that the ICTY Appeals Chamber has taken a different view.¹⁶⁶

In their notice of appeal and again in their appeal brief, the Co-Prosecutors argued that the Trial Chamber erred by failing to convict Duch cumulatively for the distinct crimes against humanity of rape and torture, and again by subsuming various prohibited acts, including rape, within the crime against humanity of persecution on political grounds.¹⁶⁷ The Co-Prosecutors not only argued that rape and torture, and rape and persecution, contain materially distinct elements not found in the other, they also argued that the Trial Chamber did not correctly apply existing case law on cumulative convictions and that there are important societal interests, which must be considered when considering cumulative convictions.¹⁶⁸ On the latter point, the Co-Prosecutors posited that there are clear societal interests in convicting the accused with rape, torture, and persecution in order to have the judgment paint a complete picture of Duch’s criminality, and to recognize that the charge of rape protects the fundamental right to decide matters relating to one’s sexuality and protects personal dignity.¹⁶⁹ This manner of telescoping acts that

¹⁶³ *Id.* ¶ 366.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* ¶ 568.

¹⁶⁶ *Id.* ¶ 564. Without explanation, the ECCC Trial Judges based their approach on a minority dissent in the ICTY Kordic Appeals Judgment. *Id.* ¶ 565.

¹⁶⁷ Prosecutor v. Kaing Guek Eav, Case No. 001/18-07-2007/ECCC/TC, Co-Prosecutors’ Notice of Appeal Against the Judgment of the Trial Chamber in the Case of Kaing Guek Eav *alias* Duch, ¶¶ 5-6 (Aug. 16, 2010), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/F14_EN-1.PDF; and Prosecutor v. Kaing Guek Eav, Case No. 001/18-07-2007/ECCC/TC, Co-Prosecutors’ Appeal Against the Judgment of the Trial Chamber in the Case of Kaing Guek Eav *alias* Duch, ¶¶ 162, 199 (Oct. 13, 2010), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/F10_EN.PDF [hereinafter Duch Co-Prosecutors’ Appeal Against the Judgment].

¹⁶⁸ Duch Co-Prosecutors’ Appeal Against the Judgment, *supra* note 167, ¶ 191.

¹⁶⁹ *Id.* ¶¶ 179, 180, 188.

clearly contain distinct elements of crime, especially and including acts of gender-based violence, has been thoughtfully, and persuasively, critiqued in the case of a similarly reasoned ICC trial judgement.¹⁷⁰ The Supreme Court Chamber heard oral arguments on the appeal in March 2011 and was scheduled to render its judgment a few months later.¹⁷¹ Given the ongoing need to ensure that gender-based violence receives the attention it deserves within international criminal trials, many hope that the Supreme Court Chamber will follow the general lead of the other tribunals in ensuring that charges with materially different elements are not unduly collapsed into each other.

B. Case 002

The second development of note on gender-related issues came in the Closing Order issued by the Co-Investigating Judges for Case 002, involving senior members of the Khmer Rouge Central Committee and/or Standing Committee: Ieng Sary, Khieu Samphan, Nuon Chea, and Ieng Thirith.¹⁷² The Closing Order confirmed the charges the defendants will face at trial, including the use of forced marriage within the Khmer Rouge regime. Forced marriage is charged as an inhumane act and as rape under the category of crimes against humanity.¹⁷³ Specifically, the Closing Order noted that acts of forced marriage took place on a nationwide basis, and that the “victims were forced to enter into conjugal relationships in coercive circumstances” with the aim of “enforced procreation.”¹⁷⁴ Even former Buddhist monks who had been disrobed were forced to marry.¹⁷⁵ The Closing Order found that forced marriages were both

¹⁷⁰ WAR CRIMES RESEARCH OFFICE INTERNATIONAL CRIMINAL COURT LEGAL ANALYSIS AND EDUCATION PROJECT, THE PRACTICE OF CUMULATIVE CHARGING AT THE INTERNATIONAL CRIMINAL COURT (May 2010), http://www.wcl.american.edu/warcrimes/icc/documents/WCRO_Report_May2010.pdf?rd=1.

¹⁷¹ ECCC, ECCC Case 001: Duch Appeal Hearing in 2011, <http://www.eccc.gov.kh/sites/default/files/5-Fact%20Sheet%20on%20Case%20001%20Appeal%20Hearing.pdf>.

¹⁷² Prosecutor v. Nuon Chea, Ieng Sary, Khieu Samphan and Ieng Thirith, Case No. 002/19-09-2007-ECCC-OCIJ (PTC75), Decision on Ieng Sary's Appeal Against the Closing Order, ¶ 371 (Apr. 11, 2011), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D427_1_30_EN.PDF.

¹⁷³ *Id.* ¶¶ 1430-31, 1442.

¹⁷⁴ *Id.* ¶¶ 1442, 1443, 1445.

¹⁷⁵ *Id.* ¶ 842.

systematically undertaken and were widespread, indicating “that they were decided and coordinated by the highest leadership of the CPK [Communist Party of Kampuchea, or Khmer Rouge]....”¹⁷⁶ Multiple forced marriages took place at the same time, involving between 20 and 60 couples.¹⁷⁷ The Closing Order states that, “[i]n the majority of cases of forced marriage[,] death threats were made, violence was used and people were even executed if they refused to marry.”¹⁷⁸ The marriages took place without the traditional rituals and absent parental involvement.¹⁷⁹ The Closing Order was appealed and the characterization of forced marriage as the crime against humanity of rape was struck out on the basis that “by 1975 rape did not exist under international law in its own right as an enumerated crime against humanity.”¹⁸⁰ Case 002 is scheduled for initial hearing in June 2011.¹⁸¹

The forced marriage charge represents a significant positive development for international criminal law for several reasons. First, these charges focus on a gender-based act which took place against both men and women, thereby highlighting the social construction of both male and female civilian roles by the Khmer Rouge.¹⁸² Second, these charges will take the analysis of forced marriage, first undertaken by the Special Court for Sierra Leone,¹⁸³ into new territory, which will expand international criminal law’s understanding of this gender-based act. Finally, the focus on forced marriage within Case 002 will shed light on gender-based crime

¹⁷⁶ *Id.* ¶ 1446.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* ¶ 1447.

¹⁷⁹ *Id.*

¹⁸⁰ Prosecutors v. Nuon Chea, Ieng Sary, Khieu Samphan and Ieng Thirith, Case No. 002/19-09-2007-ECCC-OCIJ, Closing Order (Sept. 15, 2010), <http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D427Eng.pdf>.

¹⁸¹ ECCC, Trial Chamber Announces Agenda for Case 002 Initial Hearing, <http://www.eccc.gov.kh/en/articles/trial-chamber-announces-agenda-case-002-initial-hearing>.

¹⁸² As mentioned earlier, gender-based violence directed against men and boys tends to be overlooked within international criminal law charging and prosecutions: Sivukumaran, *Lost in Translation*, *supra* note 49, at 273-74.

¹⁸³ *Sesay et al.*, SCSL-04-15-T, Trial Judgment, ¶¶ 1291-97, 1465-73; and *Prosecutor v. Brima, Kamara and Kanu*, Case No. SCSL-2004-16-A, Judgment, ¶¶ 181-203 (Feb. 22, 2008), <http://www.sc-sl.org/CASES/ProsecutorvsBrimaKamaraandKanuAFRCCase/AppealJudgment/tabid/216/Default.aspx>.

within the Khmer Rouge, something that was not highlighted in the Duch trial.

VI. CONCLUSION

While 2010 did not produce any major precedents with respect to gender issues within international criminal law, this article has provided a cross-section of notable gender-related developments at the ICC, ICTY, ICTR and ECCC. It has highlighted charges brought by the prosecution which provide a nuanced and multifaceted understanding of the role of gender in the commission of atrocities, for example in the ICC's *Mbarushimana* case and the ECCC's Case 002. It has also outlined significant judgments in which the importance of gender was explained, for example in the commission of genocide in Srebrenica in the ICTY's *Popović et al.*, and misunderstood, for example in the ICTR's *Rukundo* appeals judgment. Finally, this article has noted issues that require further consideration within international criminal law, such as the tension between recognizing the complete picture of criminality in a given situation (including recognition of gender-based crimes) and judicial calls for specificity in convictions, as was demonstrated in the ECCC's *Duch* trial judgment. It has also noted the issue of the classification of acts such as forced circumcision of men in one of the ICC's Kenya cases. While 2010 was a year in which gender issues were indeed "surfaced"¹⁸⁴ in some respects, it was also a year which demonstrated that a fulsome and widespread understanding within international criminal jurisprudence of the function of gender in genocide, crimes against humanity and war crimes is still a goal as yet unattained.

¹⁸⁴ I have taken this term from the late Professor Rhonda Copelon: Rhonda Copelon, *Surfacing Gender: Re-engraving Crimes Against Women in Humanitarian Law*, 5 HASTINGS WOMEN'S L. J. 243 (1994). She used the term "surfacing" to illustrate the need to bring previously overlooked gender issues to the fore within international criminal law.